James Wilford Garner

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DEPARTMENT OF SOCIAL WORK

Crime and Judicial Inefficiency

BY

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Ex-President Andrew D. White, in a recent address at Cornell University, declared that as a result of extensive studies carried on through a long period of years and in all parts of the Union he had become convinced that the United States leads the civilized world, with the exception perhaps of lower Italy and Sicily, in the crime of murder and especially of unpunished murders.

The truth of this severe arraignment is easily established by reference to the statistics of crime in this and other countries. The appalling increase in the one crime of murder in the United States is apparent from the following table compiled by the Chicago *Tribune* and published in its issue of December 10th last:[1]

[1]I cannot verify the accuracy of the above statistics. A carefully prepared table, published by Judge William H. Thomas, of Montgomery, Ala., covering the years 1881-1906 shows substantially the same results.

Year.	Number of murders and homicides in the U. S.	Number for each million of people.	Number of executions in the U. S.	Number of murders and homicides to each execution.	Number of lynchings.
1885	1,808	32.2	108	17	181
1886	1,499	26.1	83	18	133
1887	2,335	39.8	79	29	125
1888	2,184	36.4	87	25	144
1889	3,567	58.2	98	36	175
1890	4,290	68.5	102	42	123
1891	5,906	92.4	123	56	193
1892	6,791	104.2	107	63	230
1893	6,615	99.5	126	52	200
1894	9,800	144.7	132	73	189
1895	10,500	152.2	132	79	166
1896	10,652	151.3	122	87	131
1897	9,520	132.8	128	74	166
1898	7,840	107.2	109	72	127
1899	6,225	83.6	131	87	107
1900	8,275	108.4	117	71	115
1901	7,852	100.9	118	67	135
1902	8,834	111.7	144	61	96
1903	8,976	112	124	72	104
1904	8,482	104.4	116	73	87
Total	131,951	.....	2,286	57	2,917

It will be seen from the above table that within the space of twenty years the number of homicides has increased nearly 400 per cent; that the proportion of thirty-two homicides to each million of the population has grown to one hundred and four, and that the number of legal executions has remained substantially what it was when the number of homicides was only one-fourth as great as now. Compared with conditions in other lands, the situation in the United States, as revealed by the statistics quoted above, is not only disgraceful to American civilization, but is highly serious and deserves the thoughtful consideration of all good citizens. As against nearly 9,000 homicides in the United States in 1903, only 321 were reported in the German Empire, with approximately sixty million inhabitants; only 322 in England and Wales, with a population of thirty-two and a half million; 526 in France, with a population of thirty-eight million, and 61 in the Dominion of Canada, with a population of five million. With 112 homicides to each million of the population in the United States in 1903, England and Wales had less than 10 (1902), France 13½ (1899), the German Empire less than 5 (1899), and Canada about 12 (1903). In the city of Chicago in 1906 one hundred and eighty-seven homicides were reported, as against twenty-four in London, with a population three times as great, twenty-two in Paris and forty-four in Berlin, including attempted murders. The worst feature about the situation in the United States is the small number of convictions and executions, the latter being but little more than one per cent of the homicides, one in seventy-three (1904), while the

number of lynchings exceeds the number of legal executions.[2] With 187 homicides in Chicago last year, there were but two cases of capital punishment, and the Cook County jailer informs me (April, 1907) that there are no murderers awaiting execution.

These facts need little comment. Taken in connection with the statistics of the increase of other crime than murder, they reveal a reign of lawlessness, a disrespect for constituted authority and a judicial inefficiency without a parallel in any other civilized country. Dr. Cutler, in his interesting volume on "Lynch Law," shows that during the last twenty years more than 3,000 persons have been put to death in the United States by lynch law, whereas, according to the statement of a well-known American jurist, there has not been a case of lynch law in England for seventy-five years, and possibly the same may be said of Canada, which is separated from the United States only by an imaginary boundary line.[3] Everywhere in the United States we find an increasing disposition upon the part of the people to "take the law into their own hands" as they say, where there have been flagrant failures of justice, and inflict, by mob law, that punishment which should alone be the function of the courts. The causes for the extraordinary increase of crime in the United States are due partly to the tolerant attitude of the people toward the criminal class and partly to the lax administration of the criminal law, which, by impairing popular confidence in the efficiency of the courts, fosters the mob spirit among all classes, and by the uncertainty or failure with which it metes out punishment encourages the violation of law. There is, as ex-President White has pointed out, too much sham humanitarianism, too much overwrought, maudlin sentimentality in favor of the criminal and too little appreciation of the rights of society. In spite of the extraordinary increase of the crime of murder, we hear it said that the state has no right to put murderers to death.[4] Convicted criminals of the worst type are pardoned through personal sympathy for their families,

[2]These statistics are compiled mainly from the tables of the Chicago *Tribune,* the estimates of Judge Thomas, referred to above, and the Statesman's Year Book. See also tables of statisics in the Chicago *Record-Herald* for July 3, 1906. Statistics recently collected by the New York *World* show that in 1904, out of 216 convicted murderers in the prisons of New York State, only five were awaiting execution, and that of 2,107 murderers held for trial in that state during the ten years from 1896 to 1905 only 32 were capitally punished.

[3]Several well-informed Canadians inform me that they have never heard of a case of lynching in the Dominion, and upon inquiry I have received similar testimony regarding the German Empire.

[4]Mayor Dunne of Chicago has recently expressed this opinion. The offenses of robbery, burglary and assaults upon women in this city during the last year have been so numerous and bold as to cause general alarm. A bill fixing the death penalty for these offenses is now before the legislature. One of the senators from Chicago, in advocating the bill, declared that there were communities in his district in which the citizens were constantly terrorized. Women, he declared, could not venture on the streets even in daylight without being assaulted, and if they resisted, murdered. The city council passed a resolution memorializing the legislature to prescribe the death penalty for assaults on women and children, but until there is a different public attitude toward crime there is little likelihood that this will be done.

sometimes upon the ridiculous representation that they have made "brave fights" against "fearful odds" for their lives, not infrequently upon petitions signed by the judge and jury who made the conviction or by those of the community who have been wronged. One of the worst traits of American civilization, as compared with that of England and some of the countries on the continent, is the general disrespect for law among all classes. To one familiar with the law-abiding instincts of the English people and their regard for authority the lawlessness of Americans seems strange indeed, considering the racial identity of the two peoples and the similarity of their legal institutions.

To a large extent conditions in America are due, as I have said, to inefficient administration of the criminal law—are the result, to use the language of Justice Brown, of the United States Supreme Court, of the failure of the courts to discharge their natural functions. This view is no longer confined to the ranks of laymen, but, and it is an encouraging sign, the best and most candid judges and practitioners are beginning to admit that there are communities in the United States where there has been a virtual breakdown of the administration of criminal justice.[5] The causes of this inefficiency are not far to seek. They arise mainly from a cumbersome and antiquated procedure which is slow to start, which permits unnecessary delay in expediting trials once begun, which attaches undue importance to technicalities, as a result of which the fundamental question of establishing the guilt or innocence of the accused is subordinated to mere matters of practice and procedure, that is, primarily to the attainment of technical perfection. In the second place, the workings of the jury system in the form in which it exists in the American states, together with a too wide latitude of appeal, are responsible for a large proportion of the miscarriages of justice and the escape of criminals from deserved punishment.

The constitutions of all the states guarantee to the accused a "speedy" trial, but there are few communities where this guaranty is anything more than an empty declaration. Nearly everywhere the jails are full of prisoners who have waited months for trial, and everywhere the dockets of the courts are congested with cases which cannot be reached for months or years. It was put in evidence before the New York State Commission on the Law's Delay in 1903 that on the first of November of that year there were 10,000 untried jury cases on the calendar of the first department of the Supreme Court of that state. The court was then three years behind with its work, and it required from one and a half to two years to reach a jury trial in King's County and in the eighth judicial district (Western New

[5]Hon. William H. Taft, a man who has had large experience both at the bar and on the bench, recently declared in an address at Yale University: "I grieve for my country to say that the administration of the criminal law in all the states of this Union (there may be one or two exceptions) is a disgrace to our civilization." Judge Amidon, of the United States District Court for the District of North Dakota, recently, in an adddress before the Minnesota Bar Association, expressed a similar opinion of our system of criminal justice.

York).[6] The clerk of the Superior Court of Cook County, Illinois, writes me that at the beginning of the present year 12,653 cases were pending before the Superior Court and 18,828 cases before the Circuit Court. During the last two years these courts have made notable progress toward clearing their calendars, although the former is still more than a year behind and the latter about two years in arrears with its work. In some of the other states conditions are even worse than those here described. Aside from the injury to the accused, the effect of such delays is often to defeat the ends of justice.[7] During the long period intervening between the commission of the offense and the beginning of the trial witnesses sometimes die, or remove from the jurisdiction of the court, or, owing to the infirmities of memory, forget material facts in regard to the crime, and, what is a common occurrence, public interest in the case subsides, thus removing that pressure which is one of the chief incentives to induce the state's attorney to prosecute the case. The judicial annals of all our states are full of flagrant instances of the breakdown of justice on account of the delays in bringing cases to trial. At this moment I recall a case reported in the press dispatches last July of a man who was kept in a Milwaukee jail for ten months awaiting trial on a charge for which the maximum punishment was ninety days' imprisonment.[8] An "outrageous" instance of such a delay, to use the language of an Illinois lawyer, is afforded by the Iroquois Theatre fire case. The fire occurred on December 30, 1903, resulting in the loss of nearly six hundred lives, and two months later the owner of the theatre was indicted. The indictment was held under advisement three months by the judge and then quashed. On March 4, 1905, a new indictment was made, and it was held by the judge for a period of seven and a half months. Then an entire week was spent in arguing the question of a change of venue. Finally, in March, 1907, about four years and three months after the fire, the case was brought to trial only to result in the acquittal of the defendant upon instructions from the court that the building ordinances under which the indictment had been found, were defective—that is, the verdict was based not on the merits of the case (the judge said the defendant might be morally

[6]Report of Commission on the Law's Delay, pp. 8, 17.

[7]This is particularly true as regards civil controversies. Mr. Wheeler H. Peckham, chairman of the New York Commission on the Law's Delay, related before that body an instance illustrating this fact. He said he had a case in which there were two witnesses, and while waiting fifteen months for an opportunity to bring it to trial one of the witnesses died and the other moved away. He concluded, therefore, that it would be better to abandon the case, and so it was dropped. (Commis. on Law's Delay, p. 169.) Justice Gaynor, testifying before the same commission concerning the necessity of bringing commercial cases to trial speedily if they were to be tried at all, declared that such cases could rarely "live more than three months, and that in three years they were as dead as a door nail." (*Ibid.*, p. 273.)

[8]One of the causes of delay in bringing cases to trial is the grand jury system. After arrest and hearing before a magistrate, the accused must be held to await the action of a grand jury that may not be summoned within three or four months. The remedy is that already adopted in a considerable number of states and which has existed in Connecticut nearly a hundred years, namely, to authorize trials upon information by the state's attorney subject to certain restrictions in the interest both of the criminal and of sociey.

guilty but not legally guilty) but rather on a technicality. That criminal prosecutions may be more promptly initiated and rapidly expedited the experience of England affords abundant evidence. It is the practice there to bring the accused before a magistrate within a few hours after his arrest and commit him to the next session. Rarely three months elapse between the committment and the infliction of the punishment if he is found guilty.[9]

After the case has been reached on the calendar there is the delay of impaneling the jury—a delay which, under the practice of most of our states, is coming more and more to be an intolerable evil. This proceeding, as Justice Brown well observes, ought never consume more than an hour or two, and under the English procedure this is the rule. Two flagrant instances of this evil were recently afforded by the Gilhooley and Shea cases in Chicago. In the former case nine and a half weeks were required to select the jury, involving an examination of 4,150 talesmen, and at a cost of some twenty thousand dollars to the state. The selection of the first Shea jury required thirteen weeks, the summoning of 10,000 veniremen, the examination of 4,716 talesmen at a cost of $40,000 to the state, and over $20,000 to the defendant, and there is no reason to believe that the jury finally chosen were any better qualified than the first twelve men examined.[10] The court permitted counsel to introduce false issues and ask irrelevant questions concerning their social, religious and business affiliations, thus laying the foundations for indefensible challenges.[11] In the Gilhooley trial counsel for the defense interrogated one of the jurors nearly two hours, mostly on immaterial matters, and the state's attorney put him through a similar ordeal, the request of the state that thirty minutes be made the maximum time for the examination having been denied by the court. According to the English practice the requirements of due process of law in the selection of juries are satisfied by the simple inquiry whether the prospective juror is in any way related to the defendant, and if he knows of any reason why he is unable to return a verdict in accordance with the law and the evidence. In the second Shea trial the judge followed this

[9]It is refreshing to note a marked awakening of sentiment among the judges to the evil described above. Recently Judge Barnes, of Chicago, declared that "the trouble with our criminal law is that offenders are not brought quickly enough to trial. If a man, as soon as he commits a crime, could be brought immediately to trial and sentenced forthwith we should have a very great decrease of crime." State's Attorney Healy, of Cook County, has expressed a similar opinion.

[10]T. Newton Crane, Esq., formerly a member of the St. Louis bar but for some years past a prominent barrister of London, in a letter to Hon. Joseph H. Choate under date of March 31, 1903, speaking of the English procedure of impaneling juries, said: "The examination of jurors on their *voir dire* is absolutely unknown in England, while many lawyers who have been in practice for twenty years or more have never known a juror to be objected to or excused for cause. It not infrequently happens that the same twelve jurymen will hear three cases without leaving the box." (Report Commis. on Law's Delay, p. 111.)

[11]Another illustration of the practice of irrelevant interrogatories in the selection of juries was recently offered by the Iroquois Theater fire case, where counsel for the defendant asked prospective jurors whether they had any prejudices against dancing, whether they were fond of music, whether they believed in theater-going, whether they were prejudiced against city people, whether any of their families were ever hurt in a fire, what newspapers they had read, etc.

sensible rule and the jury was selected in twelve days. He refused to permit the disgraceful wrangling, dilatory obstructions and rambling long-drawn-out and irrelevant interrogations which marked the proceeding by which the first jury had been impaneled.

The remedies for most of the evils that have grown up in connection with the selections of juries are: The prohibition of irrelevant examinations, the making of the decision of the trial judge final upon objections to questions asked prospective jurors, and the forbidding of reversals upon such decisions unless they amount to a clear abuse of discretion, a substantial reduction of the number of challenges allowed, provision for special venires in important cases, and the amelioration of the conditions of jury service by treating jurors not like prisoners undergoing punishment, but as citizens performing an honorable public service.[12]

The progress of the trial after the selection of the jury is often unnecessarily hindered by slavish adherence to rules of procedure which are prolix, antiquated in many particulars and honeycombed with technicalities which to a layman seem to have no other purpose than to delay judgment or provide loopholes of escape for criminals. Indictments which are not loaded down with meaningless verbiage and which do not go into an absurd degree of particularity—which, in short, do not conform in the minutest detail to the technical requirements of the "sacred" forms of procedure, are quashed. Every prosecuting officer knows how difficult it is, on account of the insistence of the courts upon technical accuracy, to frame an indictment that will be sustained.[13] Not infrequently ingenious counsel who have hopeless cases refrain from demurring to indictments which they know to be technically faulty in order that they may move for new trials in case their clients

[12]It is not strange that a man who is confronted by the prospect of being dragged away from his home and business and kept in a state of virtual imprisonment for weeks and months should profess prejudice or exaggerate possible sympathies in order to escape the hardships incident to such service. State's Attorney Healy of Chicago, recently stated the matter correctly when he declared that the tendency of the professional and business man to avoid jury service is due to the failure of the law to provide a more expeditious procedure for the trial of cases. That the amelioration of the conditions of jury service would diminish the difficulties of impaneling juries was shown in the second Shea trial, when Judge Kavanagh announced that jurors would be treated more humanely and that instead of being locked up like prisoners they would be treated with the consideration due citizens performing a public duty. With this assurance the selection of the jury proceeded at a rate which, as compared with the first trial, was expeditious enough.

[13]Reversals have been granted for the omission or inclusion of qualifying words or even the abbreviation of the name of the state in whose name the indictment is brought. A recent instance of the difficulty experienced in framing an indictment free from technical flaws was afforded by the case of Senator Burton, of Kansas, who was charged with improperly accepting a retainer for the use of his influence before the Postoffice Department. Three successive indictments were drawn, one of which was quashed because of a mere variation as to where the money was received, whether at Washington or Kansas City, a fact which had no relation to the guilt or innocence of the accused and which might well have been considered as immaterial. The state's attorney barely succeeded in drawing a good indictment before the statute of limitations began to run against the case.

are convicted. If the indictment is sustained there is always a probability that the case will be postponed, when called, on account of the unpreparedness of counsel, the absence of material witnesses or similar causes. Everyone has known of notorious cases to be continued until finally the popular demand for prosecution subsided, and the state's attorney, through sheer worry or lack of interest, dropped the case and turned the criminal loose. Here, as in other respects, the English procedure is an improvement upon that followed generally in the American states. Except for sickness, evidence of which must be produced in writing, an English judge will not permit continuances or adjournments. No request to have a case stand over or to go to the next term merely for the convenience of counsel, says a prominent London barrister, would be listened to.[14]

The progress of the trial is frequently unnecessarily delayed by the method of examining witnesses[15] and by protracted arguments over questions concerning the admissibility of evidence. It is a common complaint against our method of criminal procedure that too much time is wasted over technical objections to evidence. Here again the English practice of forbidding long-drawn-out arguments on such questions might well be followed in the United States. Justice Ingraham, of the New York Supreme Court says, "I have heard cases tried in England quite a number of times, both at the Assizes and in London, and I do not think I ever heard five minutes given during a trial of a case to the discussion of questions of evidence. I have seen case after case go through without the question of evidence being raised at all.[16] This is a reform which any judge who has the proper conception of his duty may introduce without exceeding his legal authority.[17]

The progress of criminal trials in England is further facilitated by a procedure which is simple and expeditious, and which relieves the trial court of the preliminary work of preparing the case for trial. In the beginning the case is taken in hand by a master who whips it into shape, and engineers it through the preliminary stage, after which a trained barrister takes it in charge and it is quickly disposed of by the court. Thus the time of the judge is never wasted in hearing applications, interlocutory motions and other matters which may as well be disposed of out of court, thus leaving the court nothing to do but try the case. The English system of pleading has in late years been freed from technicalities, so that not only has the evil of retrials been greatly reduced, but the ability of the courts to dispatch business has

[14]Letter of Mr. Crane to Mr. Choate, cited above.

[15]Justice Brown suggests that the progress of the trial might often be facilitated by requiring counsel to stand while examining witnesses and by prohibiting them from taking notes. Green Bag, Vol. 17, p. 625.

[16]Testimony before New York Commission on the Law's Delay, p. 247.

[17]Judge Kavanagh, in the second Shea trial, moved apparently by the complaint which had been made against the conduct of the judge who tried the first case for permitting counsel to spend entire days in arguments and wrangles and deeply impressed, as he says, by the results of some personal observations of the procedure of the English courts during the preceding summer, announced to counsel that they would not be permitted to delay the trial as before, but that points raised on the admissibility of certain evidence would be decided by the court without argument.

largely increased.[18] Concerning the efficiency of the English procedure and the reasons for its superiority over that in the American states, Justice Brown, recently retired from the supreme court, has this to say:

One who has watched day by day the practical administration of justice in an English court cannot but be struck by the celerity, accuracy, and disregard of mere technicalities with which business is transacted. One is irresistibly impelled to ask himself why it is that, with the reputation of Americans for doing everything from the building of bridges over the Nile or battleships for Russia and Japan, to harvesting, reaping, plowing and even making butter by machinery, faster than other people, a court in conservative old England will dispose of half a dozen jury cases in the time that would be required here for dispatching one. The cause is not far to seek. It lies in the close confinement of counsel to the questions at issue and the prompt interposition of the court to prevent delay. The trial is conducted by men trained for that special purpose, whose interest is to expedite and not to prolong them. No time is wasted in immaterial matters. Objections to testimony are discouraged, rarely argued and almost never made the subject of exception. The testimony is confined to the exact point in issue. Mere oratory is at a discount. New trials are rarely granted. A criminal trial especially is a serious business, since in case of a verdict of guilty it is all up with the defendant and nothing can save him from punishment but the pardoning power of the Home Secretary. The result is that homicides are infrequent, and offenders rarely escape punishment for their crimes.[19]

One of the most common causes for the breakdown of criminal justice is found in the workings of the jury system in the form in which it exists in America. This is due mainly to the practice by which the jury is exalted at the expense of the judge and a unanimous verdict required to convict. There is still a disposition, as in Blackstone's day, to worship the jury as a sort of fetish and to regard the judge with a kind of superstitious terror, although nearly everywhere the judges are popularly elected for definite terms. In some states this feeling is so deep rooted that juries are, by the constitution, made judges of the law as well as of the fact,[20] and practically everywhere they are forbidden to even listen to suggestions from the court concerning questions of fact. As Judge Grosscup well says, the American

[18]Every well-informed lawyer and judge who testified before the New York Commission on the Law's Delay commended the efficiency of the English courts. T. Newton Crane declared that the "promptness and dispatch" with which they tried cases was "quite incredible to the patient New York lawyer who was accustomed to wait three years for the first opportunity to try a jury case." Justice Friedman, of New York, stated that the "results in England were truly great," and others gave similar opinions. (Report, pp. 77, 277.) The English master of judicial statistics, in a letter to Ambassador Choate under date of April 16, 1903, stated that twenty-three judges sitting at London handle all the litigation of England and Wales, with a population of over 32,500,000, and that they actually try and determine an average of 5,600 cases a year, or more than twice as many as are tried by forty-three judges in New York and Kings Counties. (Report of Com. on Law's Delay, pp. 76, 106.)

[19]Green Bag, Vol. XVII, p. 624.

[20]This is true in Illinois. A bill to limit the power of juries to the determination of questions of fact is now before the Illinois legislature. It was drawn by Ex-Judge Stein, of Chicago, and has been recommended by the Supreme Court, which is required by the constitution to study defects in the laws and suggest such alterations as it may think proper.

judge is practically not allowed to take part in the trial of cases. His position is rather that of an umpire or moderator than of a judge in any real or vital sense. He may listen to applications of various kinds and make rulings or motions, but he cannot comment on the evidence, or review the facts, sifting out the material from the immaterial, and putting them before the jury in intelligible and coherent form. It matters not how much counsel may confuse and mislead the jury by their arguments, the judge cannot set them right before giving the case into their hands. Secretary Taft in a recent address complained of the position of impotency to which American judges have been reduced, and advocated the restoration to them of some of the powers which English judges enjoy at common law, especially if the unanimity rule as to verdicts is to be retained.

The weakest point in the jury system is the rule requiring unanimous verdicts to convict. Although time honored, there have always been some to see the absurdity of the rule. Hallam, in his "Middle Ages," called it a "preposterous relic of barbarism; Jeremy Bentham and Francis Lieber inveighed against it, and Judge Cooley, in his edition of Blackstone, declared that the rule was "repugnant to all experience of human conduct, passions and understandings," and asserted that "it could hardly in any age have been introduced into practice by a deliberate act of the legislature." Justices Miller and Brown, of the United States Supreme Court, and ex-Judge William H. Taft, are all on record as favoring a modification of the rule. Justice Ingraham, of the New York Supreme Court, has suggested the possibility of adopting a rule making a verdict by three-fourths of the jury sufficient to convict, subject to the approval of the presiding judge.[21] Nowhere on the continent of Europe does the unanimity requirement prevail. In Germany, Austria and Portugal, a verdict may be returned by two-thirds of the jury; in France and Italy by a bare majority, and in the Netherlands, where crime is almost non-existent, trial by jury does not prevail at all. In Scotland, curiously enough, a unanimous verdict is required to convict in civil cases while a two-thirds verdict suffices in criminal cases. In England the unanimity rule still prevails but juries are never empowered, except in libel cases, to pass on questions of law, and in determining questions of fact they are so much under the control of the court that many of the abuses which result from jury trials in the United States are avoided. The theory upon which the unanimity rule rests is that twelve men may be found who will take the same view of a disputed fact, that the balance of each juror's mind can be struck in the same direction, that all are able to feel the same cogency of proof and that no one can be drawn to a conclusion different from that at which his fellows have arrived.[22] It is needless to say that such conditions are rarely present in the minds of twelve men picked up at random from the community. The result is that in many cases the unanimity is apparent and not real. Everyone is familiar with

[21]Report of N. Y. State Com. on Law's Delay, p. 256. Judge Gibbons, of Chicago, recently, in a letter to the Board of Cook County Commissioners, recommended the abolition of the unanimity requirement and the substitution of a rule making a verdict by three-fourths of the jury sufficient to convict.

[22]Compare, "Forsythe, Trial by Jury," p. 205.

cases in which a single juror has set at naught the opinions of eleven—has, by sheer obstinacy and power of physical endurance, compelled his associates to return verdicts which did not represent their real convictions, or driven them to disagreements, in either case defeating justice. The unanimity rule gives too much power to one man. It virtually places the protection of the community in the hands of a single individual who is often selected without regard to mental or moral qualification.

It is well known that verdicts are often compromises. The hard lot of the juror who is kept away from his home and business often tends to drive him to yield a few points and ultimately to sacrifice his real conviction in order to escape from the discomforts and hardships incident to jury service in protracted cases. In many of the American states the unanimity requirement in the trial of civil cases has been dispensed with, and in a considerable number of states the jury may be waived altogether with the consent of the parties. Likewise in a number of states the constitution permits verdicts to be returned by less than twelve jurors in cases involving misdemeanors, and in several (Louisiana and Montana, for example) a verdict by two-thirds of the jury may suffice for conviction in all cases not amounting to felony. Everywhere there is evidence of increasing dissatisfaction with the results of the unanimity rule.

One of the principal weaknesses of the jury system is the rule which requires the jury to be satisfied beyond a reasonable doubt of the guilt of the accused before returning a verdict of conviction. As if this were not enough, we not infrequently find the courts delivering instructions to juries to give the "most charitable and merciful construction" to the facts. This rule, together with the sacrosanct interpretation given to the doctrine of presumed innocence, a presumption which, as Dean Huffcut well observed, is raised by some courts to the value of actual proof of innocence, enables a large proportion of criminals to escape punishment. Both rules are no doubt the means of occasionally saving an innocent man, but by weakening public confidence in the courts and encouraging crime they have caused the death of many times the number of those whom they have judicially shielded.[23] The rule as to reasonable doubt should be abolished and the jury required to convict when satisfied by a fair preponderance of the evidence of the guilt of the accused.

The most prolific source of the law's delay is the American practice of allowing appeals almost as a matter of course and of reversing the decisions of lower courts upon technical errors and granting new trials to criminals who have already been convicted. The rule also contributes powerfully to the encouragement of litigation, and so frequently ends in flagrant miscarriages of justice as to impair seriously the public confidence in our present system of criminal justice. Justice Brown hardly exaggerated the facts when he said that, according to American procedure, the rendering of the verdict is only the beginning of the trial in serious criminal cases. The Supreme Court reports of all our states are full of cases illustrating the

[23]On this point compare the opinion of Everett P. Wheeler, in Columbia Law Review, Vol. IV, p. 356.

truth of Justice Brown's statement. Judge Everett P. Wheeler, in an article in the *Columbia Law Review*,[24] cites the case of a negro desperado in New York who had been tried three times for the same murder, and while awaiting his fourth trial escaped and was shot in December, 1900, while resisting arrest. He quotes the New York *Times* of July 16, 1903, for an account of the lynching of a murderer who had been twice found guilty by the unanimous verdict of a jury and twice granted new trials on technical grounds. After the third conviction he was lynched by a mob composed of the citizens of the community, who doubtless feared that a fourth trial would follow, ending in the acquittal of the criminal. A somewhat similar case was the lynching of a murderer at Tallulah, Louisiana, last summer. After having been convicted and sentenced to death, the Supreme Court reversed the decision of the lower court on a technicality and ordered a new trial. The second trial was interrupted by the death of a member of the judge's family, and when the third trial was begun the plea of "double jeopardy" was set up, whereupon the case was sent up to the Supreme Court for a ruling on this point. At this juncture, two years and three months having elapsed since the offense was committed, the citizens, disgusted at the attempt to punish by due process of law a murderer concerning whose guilt there seems to have never been any doubt, took the law into their own hands and inflicted the punishment themselves. Such cases remind us that there may be an element of truth in Goldwin Smith's dictum that there are communities in the United States where lynch law is better than any other. Dean Huffcut, in an address on the "Administration of the Criminal Law," delivered at Cornell University on December 6 last, referred to a murder case which had been tried substantially three times and which had lately been disposed of, more than seven years after the offense was committed.[25] The first trial had failed near its close by the illness of a juror; the conviction upon the second trial had been set aside by the Court of Appeals for error; upon third trial he was again convicted, and the judgment was sustained by the court of last resort. The Chicago papers some time ago gave an account of a personal injury case that had been up to the Supreme Court four times and was then getting ready for its fifth journey to Springfield. Instances like these might be multiplied indefinitely. They are extreme cases, it is true, but they are not rare, and they illustrate a growing, not to say intolerable, evil in our judicial procedure.

The pernicious American doctrine that error in the procedure of the trial court shall be presumed to have affected prejudicially the rights of the defendant, and the practice of appellate courts in granting new trials, even when it can be affirmatively shown that the error complained of was immaterial, are doing more than anything else to multiply appeals, diminish popular confidence in the courts and thwart justice. The following are some of the grounds actually assigned by appellate courts for reversing the convictions of lower courts and allowing new trials: Because the indictment contained the name of the state in abbreviated form; because the word "feloniously" was

[24]Vol. IV, p. 360.

[25]For reference to a number of similar cases, see an article by Nathan Smyth in the Harvard Law Review, Vol. XVII, p. 321.

omitted from the indictment, although the evidence showed that the crime was committed feloniously; because the words "person or human being" were omitted from the indictment; because it did not appear from the record of the trial court that the accused had been arraigned and pleaded (as if he could have been tried without being arraigned and without pleading); because the jury reached a verdict on Sunday; because the defendant was allowed to offer evidence as to his good reputation for honesty and integrity, but not for truth and veracity (thus assuming that the jury might not believe the testimony as to the former, but might believe it as to the latter); because the judge was absent from the trial three minutes; because witnesses were allowed to testify that at the time of the murder bystanders shouted "fire," "murder," etc., all of which were prejudicial to the right of the accused; because the words "on oath" were omitted from the indictment; because the officer who summoned the jury was not specially sworn; because the evidence on which a notorious robber was convicted failed to show whether the stolen goods were in coin or bills; because evidence was admitted regarding former crimes committed by the accused, etc.[26] This list is taken from actual cases and might be multiplied indefinitely if it were thought necessary. Some of the instances of the enforcement of the rule of presumed prejudice regarding error in judicial procedure, says Dean Wigmore, one of the leading authorities on the law of evidence, would seem incredible even in the justice of a tribe of African fetish worshipers. The exaggerated form which it takes in America tends to reduce the trial to a mere contest over errors rather than a serious quest for justice—a sort of game which the clever lawyer who has no case on the merits seeks to play in such a way as to entrap the court into committing an error which will form the basis of a new trial. In the ordinary course the judge is requested to charge the jury on certain propositions. If he refuses and the accused is convicted a bill of exceptions follows and the case is appealed. In some states, if the judge neglects to charge the jury on every point involved in the case, the defendant, if convicted, is entitled to a new trial. If he errs in his statement regarding the applicability of the law, he lays the basis for a new trial. If he permits the introduction of certain evidence, even though it is improper, merely because of its logical irrelevancy, and should be excluded only for the purpose of saving time, the presumption is that it affects prejudicially the case of the defendant, and he is entitled to a new trial. Likewise, where the court admits hearsay evidence, the presumption is that the jury are incapable of weighing and discounting it, although perfectly capable of weighing and estimating the value of material evidence, and hence the admission of such evidence is treated as a fatal error. Thus the judge is surrounded on every side by pitfalls set by ingenious counsel, and in the trial of great criminal cases there are few who are able to pass the ordeal without falling into at least one of the traps thus set.[27]

The practice of allowing new trials upon trifling errors has become an evil so serious as to bring our system of criminal justice into great disrepute.

[26]Compare an article by George W. Alger in the Atlantic Monthly, Vol. XCVII, p. 502.

[27]Atlantic Monthly, Vol. XCVII, p. 502.

A committee of the American Bar Association, after an investigation of the subject in 1887, reported that new trials were granted in forty-six per cent of all cases brought under review in the appellate courts of this country. The Commission on the Law's Delay, created by the authority of the legislature of New York in 1903, found that the proportion in that state was forty-two per cent.[28] Upon examination of the Supreme Court reports of Illinois, covering the years 1903-05, I found the proportion in this state to be about forty per cent, fifteen of the twenty-five criminal cases reversed being upon errors which could hardly be considered as substantial in the sense that they could be shown affirmatively to prejudice the rights of the accused. A large proportion of the reversals were founded upon errors of practice and procedure, and related principally to faulty indictments and the admission or exclusion of certain evidence. A similar examination of the Wisconsin reports showed the proportion of reversals to be about thirty per cent of the total number of appealed cases. A comparison of these figures with those furnished by the master of judicial statistics in England affords striking evidence of the widely different attitude taken by the English appellate courts toward the question of error. In the year 1900, of 337 cases appealed from the High Court of Justice only fifteen were remanded for retrial, and in 1904, of 555 cases reviewed by the Court of Appeal only nine were remanded for new trials.[29] Federal Judge Amidon, of North Dakota, in an address before the Minnesota Bar Association last year, stated that he had personally examined the law reports of England covering the period from 1890 to 1900, with the result that he found that of all the cases reviewed on appeal in that country new trials were granted in less than three and a half per cent. It is a rule of the English procedure that no judgment or verdict of a lower court shall be disturbed or a new trial granted for error if there were sufficient evidence to justify the judgment or verdict, or if evidence erroneously excluded would not, in the opinion of the Appellate Court, have changed the result if it had been admitted. In other words, judgment is rendered on the merits of the case, and not on mere considerations of technical error in the record or upon questions collateral thereto. Instead of presuming that error in the trial below is prejudicial to the defendant, the presumption is that it is harmless, and it is incumbent upon the appellant to show the contrary.

One of the results of the strict enforcement of this rule by the English appellate courts is a reduction in the number of cases appealed. A defeated party who has no case on its merits can have no incentive to take an appeal. He knows well that there is no chance of securing a reversal upon immaterial errors of the court below. The consequence is that not more than one case in ten is appealed from the high court, whereas in New York State it is said that on an average thirty-three per cent of the cases tried in the first department of the Supreme Court are appealed.[30] The English procedure

[28]Commission on Law's Delay, p. 246.

[29]Letter of T. Newton Crane to Ambassador Choate, cited above. (N. Y. Com. on Law's Delay, p. 112.)

[30]Report Com. on Law's Delay, pp. 34, 76, 246. In all England in 1903 there were only 1,272 cases appealed to the higher courts, while in two departments of

does not allow a bill of exceptions to be filed and argued. If there is dissatisfaction with the verdict or judgment, application may be made to the Appellate Court in writing, accompanied by copies of the pleadings and evidence made from stenographic reports.

Moreover, the English appellate judge has all the powers of the trial judge, and he may make any order or judgment which ought to have been made by the trial court. If by reason of error below a wrong judgment was entered, the Appellate Court may enter the judgment which justice requires instead of sending the case back for retrial upon errors which were not clearly prejudicial to the right of the accused. In other words, the English appellate courts proceed on the principle that it is their business to administer justice as well as the law—a sensible rule, which originally existed at common law, but, like many of the other common law rules of legal procedure, has been changed by statute or custom.

It is gratifying to note that a beginning is being made in some of the states toward reforming the abuses of appellate procedure. Thus the code of criminal procedure of New York (section 542) declares that in capital cases the Appellate Court must give judgment without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties, and under the practice of the Court of Appeals the obligation rests on the appellant to show that the error complained of was prejudicial, that is, that but for the error the result would have been different. The same principle has been embodied in the new law for the establishment of the Chicago municipal court. This law provides that no order or judgment of the municipal court shall be reversed by the Appellate Court or the Supreme Court unless they shall be satisfied that the order or judgment was contrary to law and the evidence or resulted from substantial errors directly affecting the matters at issue. Moreover, the Appellate Court is empowered to enter such order or judgment as in its opinion the municipal court ought to have entered, instead of sending the case back for retrial. There seems to be no good reason why the rule in New York should not be extended to cover the review of other than capital cases and that the rule in Illinois should not apply to cases appealed from other than the municipal court of Chicago.

It is the testimony of the best lawyers and jurists throughout the country that the interests of justice and social order require a restriction of the right of appeal to more reasonable limits. Justice Gaynor, of New York, in his testimony before the Commission on the Law's Delay, stated the matter tersely when he declared that appellate courts review too many things, and that in our present procedure "appeals have come to be pretty nearly the principal thing."[31] Attorney Hirschberg, testifying before the same commission, asserted that the great difficulty with our procedure was that it is "distinctly an appellate system," that it is based upon the "fundamental idea that a trial and a decision are always wrong," and that as a result of the

the New York appellate division (New York City and Brooklyn) there were 2,952 appeals.

[31] P. 267.

opportunities thus afforded the temptation to indulge in litigation is vastly enhanced.[32] To the same effect was the opinion of Justice O'Gorman who stated that nearly every defeated party was willing to take a chance of securing a reversal on appeal and that they had every encouragement to do so.[33] Dean Huffcut in an address already referred to declared that the remedy for the evil described was to provide that any appeal not brought on for hearing within six months after it is taken should be stricken from the files and that in addition it should be provided that no case should be reversed unless it is affirmatively shown upon the whole record that the error complained of has been prejudicial to the defendant and has resulted in a miscarriage of justice. If this were done, he declared, appeals would not only be fewer in number but would also be more speedily pressed and with smaller chance of success.[34] President Roosevelt in his last annual message strongly recommended the incorporation of this rule into Federal procedure, and bills for its introduction into state procedure are now before the legislatures of a number of states. The want of it is, as a well-known jurist has observed, more responsible than any other one cause for the courts which are conducted by Judge Lynch.[35] It is the American practice to allow appeals as a matter of course, with little regard to the merits of the case. This privilege should be limited, as in England, to cases where the trial judge in his discretion reserves for review by the higher court some question of law which he considers doubtful and has decided adversely to the defendant.[36] It is no infringement upon the right of any person who has been convicted by the unanimous verdict of a jury chosen from his neighborhood to say that he shall not be given another chance to establish his innocence, unless it can be affirmatively shown that substantial justice was not done in the first trial. The present wide latitude of appeal, although in theory open to all, is in fact practically closed to the poor litigant on account of the expense involved. The rule thus operates to the great advantage of the well-to-do litigant by opening an avenue of possible escape which is in practice denied to the man without means. It is a common saying which is becoming truer all the time that the rich criminal with unlimited means at his disposal can, through the process of appeals and new trials, escape the punishment which he deserves and which he would receive if he were a poor man.[37] Any system of criminal justice which makes possible any such inequality in the administration of the criminal law is fundamentally wrong in principle and dangerous in practice. It not only

[32]Report Com. on Law's Delay, p. 269.

[33]*Ibid.*, p. 319.

[34]Ithaca *Evening Journal*, Dec. 6, 1906.

[35]Michigan Law Review, Vol. III, p. 262.

[36]Compare Smyth, "The Abuse of New Trials," Harvard Law Review, Vol. XVII, p. 317.

[37]Speaking on this point to the students of Cornell University, Ex-President Andrew D. White recently said: "While the number of murders is rapidly increasing, the procedure against them is becoming more and more ineffective, and, in the light of recent cases in New York and elsewhere, is seen to be a farce. One of the worst results of these cases is the growing opinion among the people at large that men with money can so delay justice by every sort of chicanery that there is a virtual immunity from punishment for the highest crimes."

encourages lawlessness among the upper classes but impairs the confidence of the lower classes in the courts and promotes the spirit of lynch law and anarchy among them. Some valuable lessons might well be learned by our legal reformers from the English and continental practice. It has not been very many years since England was agitated over the situation arising from the virtual breakdown of her judicial machinery, but they set about in a quiet way to make improvements, with the result that they have brought their judicial system up to a plane of efficiency which has not yet been attained in any American state. The New York State Commission on the Law's Delay reported that it had been "profoundly impressed" by the character and results of the English procedure, and declared that the English courts from having been the most dilatory in the world had become in recent years the most expeditious, and expressed the opinion that we "could not do better than adopt some of these modern methods of procedure which have been so thoroughly tested in England and have proven to work so well."[38]

The English have largely freed their procedure from technicalities, have simplified it and made it less cumbersome and expensive, have raised the judge to a more commanding position in the conduct of the trial, and assigned the jury its true place, have abolished the doctrine of presumed error, restricted the privilege of appeal to more reasonable limits, and in various other ways provided a procedure which, to an American lawyer accustomed to the delays and uncertainties of our system, seems wonderful indeed.[39] The procedure of the German courts since the adoption of the imperial codes presents many features analagous to that of England. There are no technicalities in pleading; the judge participates in determining what shall be proved and when and in what manner the proof is to be made; the rules of evidence are simple, trials are promptly started and rapidly expedited, and criminals are punished with a degree of certainty unknown in America.[40] In France, likewise, the criminal law is administered in a way which serves as an effective deterrent of crime and secures general respect for law and authority.

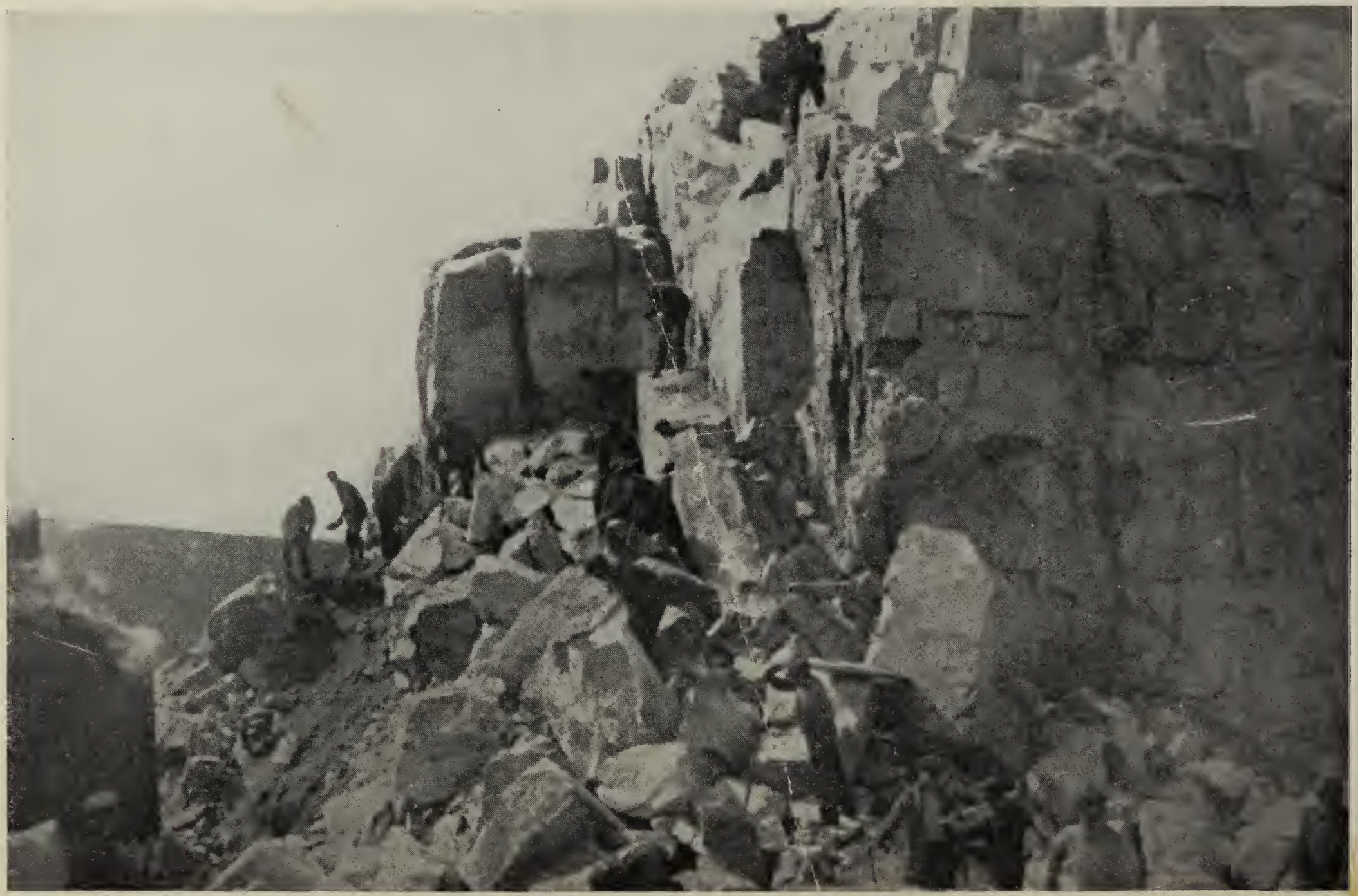
Before we may hope for a thorough-going reform of the American system there must be an entire change of attitude upon the part of the people with regard to the enforcement of law, the rights of the community as against criminals and the purpose of judicial punishment. The bench and bar must also take a more common-sense view of the whole question of the fundamental purpose of a judicial trial. There must be less disposition to subordinate substan-

[38]Report, pp. 32, 34.

[39]The New York Commission on the Law's Delay, speaking of the English system, declared that "it has undergone many important changes in practice to meet the requirements of modern social and business conditions in England, and that much of our own practice, time-honored and tolerated because 'made in England,' has been displaced by more modern methods of procedure, and is obsolete in the land from which it came—changes which have worked havoc with many venerable notions and reversed precedents to which our American courts fondly cling." (P. 75.)

[40]Compare an article by Rudolf Dillon in the Twenty-fifth Annual Report of the New York State Bar Association.

tive justice to mere matters of practice. It is also worth considering whether the time has not come when some of the presumptions of our law should not be resolved in favor of the community rather than in favor of the criminal, and whether we should not act more upon the principle that the primary purpose of a system of criminal justice is to protect the innocent members of society rather than the criminal class. Our present methods had their origin in an age when the number of capital crimes was appallingly large and when offenders were disproportionately punished for minor offenses. To make it difficult to punish persons charged with crime in such an age a procedure was developed which provided every possible loophole of escape for the accused. The old severity of penal legislation, however, has long ago been abolished, yet the old methods of procedure, with all the safeguards which they threw around the criminal, are still retained. They are totally inapplicable to present conditions, and in the interest of real justice as well as social security, they ought to be modified as they have been in England where they originated. Our duty in the premises was well stated by President Roosevelt in a letter to Governor Durbin, of Indiana, in August, 1903. He said: "The best and immediate efforts of all legislators, judges and citizens should be addressed to securing such reforms in our legal procedure as to leave no vestige of excuse for those misguided men who undertake to reap vengeance through violent methods. We must show that the law is adequate to deal with crime by freeing it from every vestige of technicality or delay."



Courtesy Fox Movietone News.

Sing Sing has its rock pile. (*Page 186*)

Courtesy Fox Movietone News.

"Take as much as you need, but no waste," is the general order. (*Page 173*)